Serendippity-Un-Ltd. and Tigerrr, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 8–CA–15121

August 27, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On April 30, 1982, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision and a motion in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified herein.[3]

The Administrative Law Judge found that Respondent's discharge of Supervisor Joseph Perrota for participating in a strike in protest over working conditions at Respondent's plant violated Section 8(a)(1) of the Act. He reasoned that this discharge was "motivated by and incidental to a desire to unlawfully discourage statutorily protected activities among the *employees*," and recommended that Perrotta be reinstated and awarded backpay along with the other five dischargees.[4]

Subsequent to the issuance of the Administrative Law Judge's Decision, the Board issued its Decision in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 58 (1982). The Board held therein that "[T]he discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act."[5] In light of this holding, we hereby reverse the Administrative Law Judge's finding that Supervisor Perrotta's discharge violated the Act.[6]

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 2, and substitute the following:

"2. Respondent violated Section 8(a)(1) of the Act on July 29, 1981, by discharging employees Leroy Nolf, Dan Kuntz, Gordon Parrish, Frank

[1] The General Counsel has moved to strike Respondent's exceptions to the Administrative Law Judge's Decision on the grounds that (1) the exceptions failed to comport with the form required by Sec. 102.46(b) of the Board's Rules and Regulations, Series 8, as amended; (2) Respondent did not promptly serve copies of these exceptions on the General Counsel and the Charging Party; and (3) the exceptions contain unwarranted, unsubstantiated, and defamatory attacks on the Administrative Law Judge, the General Counsel, and the Board. With respect to (1), we find that although these exceptions do not fully comply with the specificity requirements of Sec. 102.46(b), they sufficiently designate the portions of the Decision Respondent claims were erroneous. Moreover, the General Counsel has not shown prejudice as a result of any deficiency. We also find, with respect to (2), that the General Counsel was not substantially prejudiced as a result of the late service of exceptions, since the General Counsel had adequate time to prepare a brief in opposition to these exceptions. Regarding (3), we agree with the General Counsel that Respondent's exceptions contain unwarranted, unsubstantiated, and defamatory attacks on Board processes and policies. Although we do not condone this conduct, we will not strike Respondent's exceptions on this basis. Accordingly, the General Counsel's motion is denied.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent further contends that the Administrative Law Judge suffered from an unspecified "conflict of interest" which caused him to be biased in favor of the General Counsel. Based on this contention, Respondent has renewed its motions for a stay of the proceedings and a hearing *de novo* before a different administrative law judge, and has additionally requested that the full Board consider this case. After reviewing the record and the attached Decision in light of Respondent's allegations, we are constrained to reject these charges. Contrary to Respondent, we find that the Administrative Law Judge conducted the hearing in an irreproachably impartial manner. In fact, the Administrative Law Judge was extremely sensitive to Respondent's representative's status as a nonattorney and frequently allowed him to deviate from the Board's rules in presenting his case. Accordingly, we find and for the reasons set forth by the Administrative Law Judge in fn. 3 of his Decision, we hereby deny all of Respondent's above motions.

[3] We shall modify the Administrative Law Judge's recommended Order so as to require Respondent to expunge from its files any references to the discharges of Nolf, Kuntz, Parrish, McCann, and Biskup, and to notify them in writing that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Chairman Van de Water and Member Hunter find it unnecessary to rely on *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), enforcement denied 612 F.2d 6 (1st Cir. 1979), in dating Respondent's backpay obligations from July 29, 1981.

Member Jenkins would compute interest on the backpay of the discharges in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[4] In making this finding, the Administrative Law Judge relied upon the Board's Decisions in *Empire Gas, Inc. of Denver*, 254 NLRB 626 (1981), *Pennypower Shopping News, Inc.*, 253 NLRB 85 (1980), *Sheraton Puerto Rico Corp., d/b/a Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980), and *Downslope Industries, Inc. and Greenbrier Industries, Inc.*, 246 NLRB 948 (1979).

[5] In *Parker-Robb Chevrolet, Inc., supra*, the Board expressly overruled the latter two cases noted in the above footnote with regard to the issues involved herein, and also overruled all other decisions which follow the "integral part" or "pattern of conduct" line of cases which includes *Empire Gas, Inc. of Denver, supra*, and *Pennypower Shopping News, Inc., supra*.

[6] As set forth more fully in his concurring opinion in *Parker-Robb Chevrolet, Inc., supra*, Member Jenkins continues to adhere to the "integral part" or "pattern of conduct" line of cases relied on by the Administrative Law Judge and, therefore, would adopt the Administrative Law Judge's finding that Respondent's discharge of Supervisor Perrotta violated the Act.

McCann, and Steven Biskup because the employees engaged in a strike over working conditions in Respondent's Hubbard, Ohio, plant."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Serendippity-Un-Ltd. and Tigerrr, Inc., Hubbard, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Offer to Leroy Nolf, Dan Kuntz, Gordon Parrish, Frank McCann, and Steve Biskup immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary any replacements, and make them whole for their loss of earnings, with backpay to commence on July 29, 1981, with interest thereon, to be computed as described in that section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the discharges of Leroy Nolf, Dan Kuntz, Gordon Parrish, Frank McCann, and Steven Biskup and notify them in writing that this had been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against any of them."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT discharge employees for engaging in work stoppages over working conditions or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer to Leroy Nolf, Dan Kuntz, Gordon Parrish, Frank McCann, and Steven Biskup immediate and full reinstatement to their former jobs or, in the event such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make these employees whole for any net loss of pay or benefit which they suffered by reason of their unlawful discharge, with interest.

WE WILL expunge from our files any reference to the discharges of Leroy Nolf. Dan Kuntz, Gordon Parrish, Frank McCann, and Steven Biskup, and WE WILL notify them that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against any of them.

SERENDIPPITY-UN-LTD. AND TIGERRR, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: A hearing in the above matter was held on February 18–19, 1982, in Youngstown, Ohio, on the issues raised by a complaint issued by the Regional Director for Region 8, of the National Labor Relations Board, on September 17, 1981, and the timely answer thereto of Respondent, Serendippity-Un-Ltd. and Tigerrr, Inc.[1]

At issue is whether, as the General Counsel alleges, Respondent's employees, on or about July 28, 1981, engaged in protected concerted activities including a lawful strike and whether, on or about the next day, July 29, 1981, Respondent terminated them because of their engaging in such activities and thereafter refused to reinstate or reemploy them despite their unconditional offer

[1] The caption and Respondent's name appears as amended at the hearing.

to return; or, as Respondent contends, the employees quit their employment on July 28, 1981.

At the hearing, Respondent appeared without counsel and conducted its own defense through its president, Larry Lee Smith, by profession an osteopathic physician and not a lawyer. All parties at the hearing were afforded an opportunity to call and examine witnesses,[2] to present other evidence, to argue orally on the record, and to submit post-trial briefs. After the receipt of evidence, both sides waived final argument and thereafter the General Counsel and Respondent submitted timely briefs which have been duly considered.[3]

Upon the entire record, including the briefs, and upon my observation of the witnesses as they testified, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, Respondent admits in its answer or at the hearing, that Serendippity-Un-Ltd. (and Tigerrr, Inc., an additional name which Respondent has used from time-to-time in the conduct of its business since May 1979) is a Delaware corporation with a sole facility in Hubbard, Ohio, where it is engaged in the manufacture of truck beds. Respondent, annually, in the course and conduct of its business, receives goods directly from points located outside Ohio valued at in excess of $50,000 and admits that it has been, at all material times, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[2] Respondent's sole witness was its president, Larry Lee Smith who also represented Respondent at an all-party, pretrial telephone conference as well as at the hearing. President Smith, both in the pretrial conference telephone call, 1 week before the hearing, and again at the hearing, stated that he would call three witnesses. At the hearing, he specified that these witnesses were his current employees, Tom Kilar, Sr., Tom Kilar, Jr., and Mildred Kilar (the son and wife of Tom Kilar, Sr.). He nevertheless failed to have them appear at the hearing at any time because, he said (a) he was unprepared to go forward on the first day of the hearing at the conclusion of the General Counsel's case-in-chief; (b) he understood from the pretrial phone conversation that the hearing would not proceed on consecutive days; (c) on the first of the hearing, he said he would produce them on the second day, but on the second day of the hearing, he said that Tom Kilar, Sr., his supervisor, had another daytime job which, under the existing economic circumstances, Kilar Sr. was fearful of losing if he took time off to testify; and (d) Smith was not timely advised of the subpoena process to assure the appearance of his witnesses.

The complaint had been outstanding since September 17, 1981. Respondent's answer, succinctly and apparently professionally drafted, is dated January 19, 1982 (G.C. Exh. 1(e)). At the hearing, with respect to (d), above, President Smith failed to contest counsel for the General Counsel's assertion that about 1 month before the opening of hearing, Respondent, under the General Counsel's personal supervision, had written out the procedure for procuring blank subpoenas from the Regional Director. At no time did Respondent assert that Board subpoenas were sought or refused.

With respect to the absence of witnesses due to prevailing economic conditions, (c) above, and President Smith's alleged misunderstanding of either the Board's Rules and Regulations or my telephone statement that the hearing was estimated for 2 days and that after 6 p.m. of the second day of the hearing, Friday, February 19, 1982, I would not be available in the succeeding weeks because of other commitments, the Board may not permit this alleged confusion to unreasonably delay or overturn its hearings notwithstanding that President Smith is not a lawyer. Moreover, the hearing was adjourned early on the first day on President Smith's assertion at that time that he would produce his witnesses on the second day. He failed to do so for the above reasons which, on their face, suggest a lack of merit: inadequate and untimely knowledge of the availability of subpoenas; economic fears of one witness but failure to produce two others.

[3] Respondent's president submitted a timely post-hearing brief and motion, dated March 10, 1982. The General Counsel filed its opposition dated April 2, 1982. Respondent's document requests (1) a stay of all further proceedings; and (2) a hearing *de novo* before a different administrative law judge.

The motion for a new trial is apparently based on alleged prejudice to Respondent flowing from several sources: (a) the prejudice inherent in the all-party, pre-hearing, telephone conference call, initiated by me and conducted with Respondent's apparent consent, explicitly to encourage and establish the grounds for settlement. In substance, Respondent (as I understand the argument) asserts that a discussion of the pleadings and the issues demonstrated that "this judge had absolute knowledge of the case and was, therefore is, unqualified due to prior knowledge of the case." Under Sec. 102.35, Rules and Regulations of the National Labor Relations Board, Series 8, subsec. (g), however, after being "assigned" to the case, and "between the time he is designated and transfer of the case to the Board," the administrative law judge "shall have authority . . . (g) To hold conferences for the settlement or simplication of the issues by consent of the parties, but not to adjust cases . . . ." In my exercising a specifically authorized power, Respondent has failed to allege a ground sufficient in law for disqualification under Sec. 102.37 of the Rules and Regulations. There is no suggestion in Respondent's allegations of my knowledge *ex parte* of any evidence, unlawful contact with parties, objection to the phone conversation, or similar disabling elements, nor does Respondent support any of its allegations of prejudice or wrongdoing by the *affidavit* required by Sec. 102.37; (b) a further alleged prejudice flows from my ruling, during the second day of the hearing (Friday, February 19, 1982), closing the record upon Respondent's failure to produce further evidence or witnesses. Respondent argues that it was prejudiced because it was not permitted to fully support its defense. As to this assertion of prejudice, see fn. 2, above; (c) Respondent also asserts direct partiality and prejudice because of my membership in a "union," and appears to suggest the generic prejudice of any administrative law judge so affiliated. Without reaching the second question, I am, for better or worse, not now, nor have I ever been, a member of a statutory labor organization; and, again, Respondent's assertion is not the subject of the affidavit required by Sec. 102.37.

To the extent Respondent's brief addresses the morality or lawfulness of the General Counsel's and the Board's existence, actions, and activities ("abomination," "immoral," etc.), it is disrespectful to the General Counsel and the Board and its processes beyond the limits of fair argument and wholly unsupported in the record. On the General Counsel's motions to strike such language and assertions, *Everspray Enterprises, Inc.*, 253 NLRB 922, 928, fn. 2 (1980); *Miami Foundry Corporation*, 252 NLRB 2 (1980).

Lastly, the General Counsel's April 2, 1982, opposition moves to strike Respondent's attempt, by post-hearing motion in its brief, to place in evidence a document, not previously identified (a decision of the State of Ohio unemployment compensation board) relating to the "quit" of alleged discriminatee Steven S. Biskup. Respondent placed in evidence similar documents relating to Biskup and to other discriminatees (Resp. Exhs. 1, 2, and 3). While it is true that Respondent fails to assert that the proffered document was newly discovered or not in existence during the hearing; and also true that such a previously unidentified, unmentioned document would ordinarily be rejected upon the General Counsel's opposition, *Quebecor Group, Inc.*, 258 NLRB 961 (1981), *S. Freedman Electric, Inc.*, 256 NLRB 432 (1981), I will place it in the record on the theory that its omission was of Respondent's oversight, especially since other Biskup documents are in evidence (Resp. Exh. 3). Since it is included in Respondent's brief, I shall award it no further identifying number among Respondent's documents.

In sum, Respondent's motion to include the Ohio unemployment compensation board of review decision in evidence is granted. The General Counsel's motion to strike from Respondent's brief unsupported and defamatory descriptions of the General Counsel, the Board, their existence, and their activities is granted. Respondent's motions for a stay and for a new trial are denied since it has failed to support its allegations of prejudice and denial of due process.

Regarding the importance of an affidavit to support an allegation of prejudice 102.37 of the Rules and Regulations, compare the similar requirements in 29 U.S.C. § 144 and "Peremptory Challenges to Federal Judges," American Bar Association Journal April 1982.

II. THE UNION AS A LABOR ORGANIZATION

The complaint alleges, and Respondent admits, that at all material times the United Steelworkers of America, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Joe Perrotta, a company foreman in charge of Respondent's day shift of about one-half dozen employees, and the General Counsel's other witnesses, testified credibly[4] that in a 3-month period prior to July 28, 1981, he and the six employees on the morning shift regularly discussed unsafe working conditions in the plant, the unknown extent of their coverage under Respondent-provided hospitalization insurance, a need for regular pay raises, the necessity for sickness-injury pay in case they are injured on the job, the need for a pension plan, and similar matters. In this 3-month period prior to July 28, 1981, he spoke with President Larry Lee Smith on no fewer than 10 occasions wherein he told Smith of employee desires to discuss grievances with him and the necessity for him to come down and talk to the employees particularly about insurance coverage and shop safety problems. In response, Smith promised to talk with the men and, on occasion, set dates for his appearance. Smith, however, failed to appear to discuss these grievances and, on this record, never discussed these matters with the employees.

Respondent, whose employees are not represented by a labor organization, employs a total of six to nine full-time production employees, two in-plant supervisors (Tom Kilar, Sr., and Joe Perrotta), and four to five part-time production employees. It is not disputed (a) that upon gaining employment with Respondent, each employee is told, often by Tom Kilar, Sr., sometimes by his wife, office clerical Mildred Kilar, that among the benefits enjoyed by Respondent's production employees is that, at the end of 30 days of employment, they are covered by major medical health insurance under a plan funded by Respondent; and (b) that each employee, when first employed, filled out health insurance applications and returned them to Mrs. Kilar.

Welder Leroy Nolf testified that, although he commenced employment with Respondent in the spring of 1981, he became concerned when he failed to receive a health insurance identification card or literature concerning the scope of coverage after 30 days of employment. He discussed this with coemployees over a 2-month period. His numerous phone calls to a health insurance carrier (whose telephone number he found on Foreman Perrotta's allegedly expired health insurance card) resulted in Nolf discovering, apparently on July 20, 1981, that four Respondent employees were covered by health insurance: Joe Perrotta, Steve Biskup, Frank McCann, and Dan Kuntz.[5] Nolf thereafter observed to his coemployees that not only he (who had been employed more than 30 days) was not covered, but coemployee Gordon Parrish, a longtime employee, was also not covered by health insurance. Employee discussion occurred up to and including their 10- to 15-minute breaktime between 9 and 9:30 a.m. on July 28, 1981. Also regularly discussed by the employees prior to July 28, initiated by welder Dan Kuntz, were various plant safety problems dealing with Respondent's shop electrical equipment. Kuntz testified without contradiction that the welding machinery contained bare electrical cables, and that a defective punch press had caused injury to an employee. Other employees testified without contradiction of the existence of open paint and paint thinner containers stored in a room near acetylene tanks used in welding. They feared that, in the event of fire due to defective electrical equipment and improperly stored paint combustibles, chances of an acetylene explosion were present.

Tuesday, July 28, 1981: Breaktime (9:15 a.m.); the Employees Punch Out

On Tuesday morning, July 28, at breaktime, Nolf told his coemployees, including Foreman Perrotta, that it was clear that some employees were not covered under Respondent's health insurance policy. Perrotta urged Nolf to use the company phone in the office and again verify from the insurance carrier what the status of health insurance coverage actually was. Nolf entered the office and was using the phone for that purpose when Supervisor Tom Kilar, Sr., walked into the office. When Nolf offered the phone to him to verify the extent of insurance coverage, Kilar refused to take the phone. Nolf then returned to the lunch table around which the day-shift employees were gathered with Perrotta and told them that the health insurance carrier again verified the coverage of only four of six employees. Perrotta then left the lunch table and told the six employees (Nolf,

[4] The General Counsel alleges that Perrotta is not a supervisor within the meaning of Sec. 2(11) of the Act. Perrotta and other employees consistently testified that he is in sole charge of the day shift, 7 a.m. to 4 p.m., and regularly exercises the power to assign employees to their jobs in his own discretion and to reassign them with regard to the exigencies of work. Notwithstanding that he has no power to hire or fire employees, I conclude that, since the attributes of supervisory capacity in Sec. 2(11) of the Act are read in the disjunctive, Perrotta's power to responsibly and regularly direct the assignment and reassignment of the work of all six employees on his shift, in his own discretion, qualifies him as a statutory supervisor within the meaning of Sec. 2(11) of the Act. *William O. Hayes, d/b/a Superior Casting Company*, 230 NLRB 1179, 1189 (1977).

Respondent's supervision is headed by Larry Lee Smith, an osteopathic physican, as president of Respondent. He does not, however, run Respondent's affairs on a day-to-day basis; rather, he engaged in the practice of osteopathic medicine. He is nevertheless consulted on a regular basis on all business problems. The chief production supervisor in the Hubbard, Ohio, plant is Plant Manager Tom Kilar, Sr., who has the power to hire and fire, reports to work on the evening shift at or about 4 p.m., and remains there until about 8 p.m. on a daily basis. He often gives next day work instructions to the day supervisor, Joe Perrotta. The lowest member of supervision is Joe Perrotta who, as above noted, has the power to responsibly direct the work of the six-employee morning shift in his own discretion. Tom Kilar, Jr., is a morning-shift production employee. Mildred Kilar, wife of Tom Kilar, Sr., is the office clerical.

[5] Respondent placed in evidence (Resp. Exh. 4) an insurance record purporting to show that as early as July 16, 1981, Nolf, Perrotta, McCann, Biskup, and Kuntz were covered. If this were true, there is no reason why Smith did not unequivocally tell Nolf that at least Nolf was covered by health insurance regardless whether other employees were covered. As seen in the text, Nolf was the prime mover in employee discontent in this area and there is no testimony or assertion from Smith that Smith, to defuse the employee walkout of July 28, ever told Nolf or any other employee that he was covered by health insurance. The document fails to show that employee Gordon Parrish was covered.

Kuntz, Parrish, Kilar Jr., McCann, and Biskup) that he was going into the office to speak with Tom Kilar, Sr., to find out what was going on and attempt to "straighten the matter out." Perrotta then entered the office and spoke to Supervisor Kilar.

Perrotta testified that he wanted to determine if Production Manager Kilar had spoken to President Smith to set a date for Smith to address the employees concerning their grievances. In the office, Kilar told Perrotta that any one who did not want to work could go home. He added: "You guys don't have no bitch." Perrotta left the office and told the employees that he was going to punch out on the timeclock and "stop work" until he could get President Smith to come down and talk with the employees about the various problems that they had.

Welder Dan Kuntz credibly testified that when Perrotta came out of the office he told them that Supervisor Kilar said that none of the employees had anything to "bitch" about; and that anyone who did not want to work should go home. Nolf recalled that, after Perrotta told them this, Perrotta picked up his lunchbox and thermos bottle and said that he would see them later; "I am tired of living on promises; I've got to prove a point and get this mess straightened out. You guys do what you want.[6] I am going to punch the clock and see if we can't get this thing straightened out."

Kuntz recalls that, as the employees were starting to walk to the timeclock, following Perrotta, Supervisor Kilar came out of the office and entered the shop. Kuntz told Kilar that all the employees wanted to do was to "talk to you." He said that the employees did not want to take any money away from the Company or even talk about something that would cost money; that the employees merely wanted to talk to Kilar to discover the extent of insurance coverage. Kilar, according to Kuntz, responded by saying: "You guys don't have a bitch at all; if you don't want to work, go home."

The employees then punched out and walked out to Respondent's parking lot at or about 9:30 a.m.

Sometime later that morning in the parking lot, Leroy Nolf and the employees drew up a list of 15 grievances including pay rates, pensions, insurance, and injury pay, which they desired to discuss with President Smith (G.C. Exh. 2). Later in the morning, after telling his coemployees that it was possible that Supervisor Kilar had not communicated with President Smith and that it would be wise to contact President Smith directly, Nolf left the parking lot and, from a nearby gasoline station, telephoned Smith at Smith's office in Canfield, Ohio. When Nolf asked Smith whether Supervisor Kilar told him that the employees were out in the parking lot, Smith admittedly said that he knew that they were in the parking lot. Nolf then asked how they could straighten out their grievances and Smith asked for a couple of the grievances. Nolf told him that two of the particular grievances were health insurance and safety problems in the shop and Smith answered that he did not want to hear about them and told Nolf to "get off his back." Nolf then told Smith that, if he wanted to resolve the grievances, he would have to hear about them sometime or another. Smith hung up. Nolf returned to the parking lot and reported the incident to the employees.

All of the General Counsel's witnesses testified that they never told Kilar Sr., Smith, or any other person, that they had quit their employment. Moreover, they testified that they never used the word "quit" on that day or at any other time.

Smith testified that, when he received the telephone call from Leroy Nolf, he denied that Nolf said that the employees had walked out. Rather, he testified that Nolf said: "We have quit."[7] After Nolf said this, Smith recalls that Nolf asked Smith what he was going to do about it and Smith answered: "If you quit, you've quit; if you've quit, that's the end of it." Smith, however, says he then inquired: "What seems to be the problem in your quitting?" and that Nolf answered that employee Frank McCann who was working for Respondent for some time did not have insurance.[8] Smith said that he told Nolf that that was not exactly true and that he did have accident and disability insurance and workmen's compensation insurance. Smith said that he admitted telling Nolf that at that time McCann did not have health insurance. He noted that, when Nolf then asked why not, Smith told him that they had tried to get McCann insured but the insurance company had turned him down because of McCann's disabling hearing impairment. After they finished discussing McCann, Nolf, according to Smith, again told him that he was in the phone booth and that the other employees were out in the parking lot. Smith said that he told them that if they quit, they should get out of the parking lot. On the basis of Smith's hesitant and often inconsistent testimony in which he changed his mind concerning what was said in these various conversations, together with my observation of his deameanor as he testified, and notwithstanding that McCann may not be covered by health insurance, I do not credit the balance of Smith's testimony where it conflicts with Nolf's testimony. I specifically discredit his testimony demonstrating Nolf's repeated use of the word "quit." Smith's testimony on this point was unbelievable when delivered and was unimproved on review of the transcript.[9]

[6] There is no suggestion that Perrotta directed the employees to punch out.

[7] Smith admitted, in his testimony, that Respondent's payroll records show, on the date July 28, 1981, that the employees had "walked out." Nothing on the payroll record demonstrates that the employees "quit" or otherwise terminated their employment either by their own actions or by Respondent's action.

[8] I do not credit Smith's version of his conversation with Nolf.

[9] Smith at first testified with assurance that Tom Kilar, Sr., telephoned him on July 28 around noon and told him that the six persons named in the complaint "quit," but it appeared a few minutes thereafter that he was not sure what Kilar said:

> Q. Mr. Smith, is it your testimony that Tom Kilar, Sr., called you up and said "We quit."
> A. No.
> Q. What did Tom Kilar say?
> A. What did Tom Kilar say?
> Q. That's my question.
> A. May I have the question again, sir.
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> • • • • •
>
> A. "They quit."

Continued

On the same day, at or about 2 p.m., while the employees were still in the parking lot, Nolf told Perrotta that he was going to leave them to telephone for some help. He ultimately reached the Union (United Steel Workers of America) of which he was previously a member and was put in contact with the union agent, Tom Fair. He told Fair of their problems; agreed with Fair that it was too late for the employees to meet with him that day; and agreed to have him meet with the employees the next morning, at 6 a.m. (1 hour before the 7 a.m. starting time in Respondent's plant) at a truckstop in nearby Hubbard, Ohio. Nolf recalls, and Fair confirmed, that Fair told him not only that they would discuss their problems and get a plan of action, but also that all employees should be ready to go to work and that Nolf should tell the employees that.

The Next Day: July 29, 1981 (Wednesday)

At 6 a.m. the next day, July 29, 1981, five of the six employees met at the truckstop, with Parrish joining them later in the morning. They filled out union membership application cards at Fair's request to demonstrate their desire to have the Union represent them and agreed to go to the plant. They arrived at the plant at or about 10 minutes before 7 o'clock at which time Parrish joined them. Within a few minutes, Supervisor Kilar emerged from the plant and went toward his car. Fair, Perrotta, and Kuntz went over to speak to Kilar.

Union agent Fair (and Perrotta, Kuntz, and Nolf, mutually corroborating their own and Fair's testimony) credibly testified and the evidence shows that, when Fair, Kuntz, and Perrotta approached Supervisor Kilar, Fair identified himself as a union agent. Fair told Kilar that "these gentlemen are here to go back to work." Kilar said that Respondent was a small family company and had no union there. Fair answered that the employees were not family employees; that even if Kilar did not want the Steel Workers Union in the plant, the employees had nevertheless demonstrated that they wanted union representation; and that enough of them had done so to start their own union in the shop, Kilar then said: "They can start a union over my dead body." When Fair repeated that the employees could start their own union in the shop, Kilar said that the employees would "have to go through [me] first to start a union here." Fair then asked Kilar whether he was going to let these "gentlemen go back to work." Kilar said that he would not permit it and that the employees had quit the day before. Fair denied that they had quit and asked Kilar if there was enough work for them. Kilar said that there was plenty of work in the shop. Fair then asked why Kilar was not permitting them to return to work and Kilar repeated that they had quit. When Fair asked Kilar whether he was firing them or laying them off, Kilar said they had quit.

Fair, Kuntz, and Perrotta returned to the other employees and told them that Kilar refused to permit them to go back to work. Fair, seeing Kilar return to the plant, told the employees that Kilar had, in effect, laid them off and suggested that they go to the Ohio unemployment compensation office and sign up for unemployment compensation benefits.

Fair then entered the plant at or about 7:15 a.m. and told Supervisor Kilar what the employees were planning to do. There he found Kilar engaged in an extended phone conversation during which Kilar pushed the phone over to Fair and said into the phone: "why don't you talk to this guy [Fair]?" Fair picked up the phone, identified himself, and discovered that he was speaking to President Smith. Fair asked for voluntary recognition as the employees' statutory representative. When Smith asked who Fair represented, Fair said that he represented Respondent's employees but refused to give any names. Smith then asked Fair to tell him under what statute he was claiming to be the statutory representative; and when Fair said that it was the National Labor Relations Act, Smith asked him for a copy. Fair then told him that he was not there to debate the employees' problems in the shop but wanted an opportunity to discuss voluntary recognition. Fair testified that, when it became clear that Smith was not willing to grant voluntary recognition, Fair told Smith that he would follow the National Labor Relations Act procedures for representation and would file an election petition. Fair ended his conversation with Smith by telling him that the employees wanted to return to work. Smith told Fair that, if the employees ever came back to work, they would come back under different "conditions." When Fair asked what conditions these would be, Smith refused to explain and the conversation ended. Fair turned to Supervisor Kilar and told him that there was no sense in his refusing to put the employees back to work. Kilar answered that the employees had quit and "that is our position."

Fair left Kilar and returned to the employees, telling them of his conversations with Smith and Kilar, and that they would not be allowed to return to work. When employees told him that they had their personal equipment at the plant, Fair returned to the plant, asked Supervisor Kilar's permission to have the employees reclaim their personal equipment, and Kilar agreed. The employees picked up their personal equipment and left.

Smith testified that he had a telephone conversation with Fair in which Fair told him that the employees were ready and willing to return to work but stated that Supervisor Kilar had told him at the same time that the employees had taken their equipment and had quit. I find that, although the employees did take their personal equipment, they took their equipment under the conditions as above noted; i.e., *after* Kilar denied their request to return to work. I do not credit Smith's testimony insofar as it suggests that, at the time of his conversation with Fair, the employees had already removed their personal equipment. Rather, I conclude that Smith learned

Smith also testified that he and Tom Kilar again spoke in person on that same day in the evening, or on the following day. He could not remember where the conversation took place or what time of day it was but recalled his asking whether the employees specifically said they were quitting. I do not credit such testimony. I observed Smith to be an evasive and consistently hesitant witness. This, together with his lack of spontaneity, leads me to conclude that much of his testimony, when material and responsive, was not worthy of belief especially when contradicted by other testimony.

of this event after Fair spoke to him and from a subsequent conversation with Kilar Sr. In short, the credited evidence does not support any inference, which the context of Smith's testimony implied, that he was reinforced in his conclusion that the employees quit their employment because, when he spoke to Kilar and Fair, the employees had already removed their personal equipment from the plant.

Smith also testified that Fair conditioned the return of the employees to work only if Respondent would grant recognition to the Union as their statutory representative. I find, on the basis of Fair's denial, the testimony of the employees (including Kuntz, Nolf, and Foreman Perrotta), and the probabilities established from the record, that Fair did not impose, as a condition of the employees' return to work, that Respondent recognize the Union as the employees' statutory representative.

Smith conceded that at no time did Respondent make an offer, much less an unconditional offer, to have any of the employees return to work. The employees thereafter registered for unemployment compensation benefits and, on each occasion, were refused benefits (Resp. Exhs. 1, 2, 3, and 6) on conclusions under the Ohio statute, that the employees had quit without "just cause." See also the decision on Biskup in Respondent's brief.

Determinations of the Ohio Bureau of Employment Services, including reconsideration decisions, indicate conclusions that Respondent's employees (the alleged discriminatees herein) quit their employment without just cause. The decisions do not pass on the question whether the employees engaged in a concerted work stoppage. Although I received in evidence the documents supporting these conclusions by the Ohio Bureau of Employment that the employees "quit" without "just cause," and with due deference both to the Ohio bureau and to the statute[10] under which such interpretations were made, I nevertheless do not give such reports governing weight in interpreting the statutory questions before me: whether the employees "quit" their employment in the sense of a permanent cessation of their work relationship, or whether they left their workplaces while engaging in a protected concerted activity and were terminated therefore. Compare: *Magic Pan, Inc.*, 242 NLRB 840, 841 with *Leshner Corporation*, 260 NLRB 157 (1980).

Lastly, Respondent offered into evidence a report (Resp. Exh. 7) of the Occupational Safety and Health Administration (OSHA) dated August 12, 1981, in which, pursuant to its August 6 inspection of Respondent's factory, OSHA found "serious" violations of the Occupational Safety and Health Act by virtue of various storage and electrical safety problems in Respondent's factory. President Smith testified that these violations were rectified so quickly that the $200 fines imposed by OSHA were waived. Compare *Tamara Foods, Inc.*, 258 NLRB 1307 (1981).[11]

[10] Ohio statutes: sec. 4141.29 (D)(2)a. The face of these denials appear to suggest that the employees "quit" because they were "no longer satisfied with the working conditions" (Resp. Exh. 1) and that the burden of establishing that the work "was no longer suitable" was on the employee. It is thus clear that, in defining a "quit," the purposes and ends of the Ohio statute are not necessarily consistent with the protections afforded by the Act; and that the interpretation of events under the Ohio statute cannot control, much less bind, the Board concerning whether the action of the employees amount to a "quit" under the National Labor Relations Act. Cf. *W. C. McQuaide, Inc.*, 220 NLRB 593, 594 (1975). See, particularly, *Duquesne Electric and Manufacturing Company*, 212 NLRB 142, fn. 1 (1974), and cases cited therein regarding the admissibility and effect of state unemployment agency determinations of an employee "quit."

Discussion and Conclusion

In *Tamara Foods, Inc., supra*, employees struck over ammonia fumes. In that case, the employees began to clock out and the employer urged the employees that they had better clock back in and if they did not clock back in they need not return to work on the next day. Respondent further stated that the employees who left work should consider themselves fired. The Administrative Law Judge found that, although the activity of the employees in clocking out was concerted activity, he found that their conduct was not protected. The Board disagreed and stated as follows:

> It has long been established that Section 7 of the Act protects the rights of employees to engage in protests, including work stoppages, over what the employees believe to be unsafe or unhealthy working conditions. *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); *Union Boiler Company*, 213 NLRB 818 (1974); *Du-Tri Displays, Inc.*, 231 NLRB 1261 (1977); *E. R. Carpenter Co.*, 252 NLRB 18 (1980); *Service Machine & Shipbuilding Corp.*, 253 NLRB 628 (1980).
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> In *N.L.R.B.* v. *Washington Aluminum, supra*, a case which closely parallels the instant proceeding, the U.S. Supreme Court held that employees have the right under Section 7 of the Act to walk off their jobs, without prior notice to their employer and without following established plant rules forbidding employees from leaving their work stations without permission, if their action is a means of protesting what they perceive to be intolerable working conditions. The general rule is that the protections of Section 7 do "not depend on the *manner* in which the employees choose to press the dispute, but rather on the *matter* that they are protesting." *Plastilite Corporation*, 153 NLRB 180, 184 (1965), enfd. in pertinent part 375 F.2d [243] (8th Cir. 1967). Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected. As we stated in *Plastilite Corporation, supra*, "we must respectfully disagree with any rule

[11] In that case where, unlike the instant case, OSHA had found no violations of safety and health regulations, the Administrative Law Judge found that an employee strike over alleged safety and health violations was not protected because there was no OSHA violation. The Board held to the contrary, asserted that the rights guaranteed employees under the Act are distinct from and are not subordinate to the provisions of the Occupational Safety and Health Act, citing *Du-Tri Displays, Inc.*, 231 NLRB 1261 (1977), and found "protected" that concerted activity wherein the employees merely believe that their working conditions are unsafe or unhealthy. In the instant case, however, not only did OSHA find violations, but described Respondent's violations of the Occupational Safety and Health Act to be "serious" in several respects (Resp. Exh. 7). These violations, both of which, in part, prompted the employee walkout, were not remedied by Respondent until some 2 weeks after the employees ceased their work.

which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the labor dispute. When a labor dispute exists, the Act allows employees to engage in concerted activity which they decide is appropriate for their mutual aid and protection, including a strike, unless . . . that activity is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions." Whether the protested working condition was actually as objectionable as the employees believed it to be, or whether their objection could have been pressed in a more efficacious or reasonable manner, is irrelevant to whether their concerted activity is protected by the Act. *International Van Lines*, 177 NLRB 353, 364 (1969); *Du-Tri Displays, Inc., supra; Modern Carpet Industries, Inc.*, 236 NLRB 1014 (1977), enfd. 611 F.2d 811 (10th Cir. 1979); *Ben Pekin Corporation*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1970).

Nor does the fact that employees fail to make a specific demand to the employer automatically render their conduct unprotected. Particularly where the employees are not represented by a labor organization which may speak to the employer on their behalf, "if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1). "*South Central Timber Development, Inc.*, 230 NLRB 468, 472 (1977); *N.L.R.B.* v. *Washington Aluminum, supra.*

* * * * *

Of particular significance here is the fact that Respondent's employees are not represented by a labor organization or covered by a collective-bargaining agreement containing a "no-strike" clause. . . .

We must also reject the Administrative Law Judge's conclusion that the employees' walkout was unprotected because the Occupational Safety and Health Administration found Respondent's plant not to violate its regulations . . . .

Accordingly, for the reasons stated above, we find that Respondent violated Section 8(a)(1) . . . because they engaged in a strike over working conditions. . . . [258 NLRB 1308–09.]

Applying the above Board rules to the instant facts, I find that it is clear, based on a preponderance of the credible evidence, that the six persons, including Foreman Perrotta, engaged in a joint and concerted cessation of work because of what the employees long perceived to be (and what OSHA shortly thereafter clearly found to be) serious health and safety violations in the plant and because of what they perceived to be inadequate coverage of Respondent's health insurance plan. Such activities, especially where, as here, there is no bargaining representative, under *Washington Aluminum* v. *N.L.R.B., supra*, are *protected* concerted activities notwithstanding the reasonableness of the employees' perception, any lack of notification to the employer of their intent to cease their work, or the reasons therefor, in order to force their demands (not present in this case) and notwithstanding alternative methods of solving the problems. In the instant case, the credited testimony of employee Kuntz demonstrates that the employees merely wanted to talk to Kilar concerning their problems and were not then attempting to enforce economic demands. Indeed, what they wanted to do at the start of the walkout was not to cease work for any extended time but to spend, according to Kuntz' conversation with Kilar, perhaps 15 minutes talking to Kilar concerning the extent of their insurance coverage. The employees were not deprived of engaging in protected concerted activity even though they were not then engaged in an immediate economic confrontation. *Lewittes Furniture Enterprises, Inc.*, 244 NLRB 810 (1979). I so find. Nor was the employee action any less protected because Supervisor Perrotta played a prominent role in triggering the walkout. *Sheraton Puerto Rico Corp., d/b/a Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980) (Member Truesdale, dissenting).

In no uncertain terms, Kilar told the employees and Foreman Perrotta that they had no "bitch" and if they did not want to work, they should go home. The employees then punched out. I conclude, however, that Kilar's conditions—work under existing conditions or punch out—was not the same as telling the employees that, if they punched out, they were terminated as was a different threat in *Tamara Foods, supra*. Thus, I find that Kilar's conditional statement did not then terminate the employees. Compare *Teresa Coal Company, Inc.*, 259 NLRB 317 (1981), and *Tamara Foods, Inc., supra.*

There is no question, on the record, however, that Kilar's declared alternative demand to the employees confirmed the employees in their intent to cease work and led to the conversion of a short protected work stoppage, *Lewittes Furniture, supra*, into a listing of further economic and safety grievances and an economic strike. This occurred when, after the walkout, the employees drew up their list of economic demands and requests for changed working conditions out in the parking lot (G.C. Exh. 2). It also led to their seeking aid from the Union.

I further conclude, however, that on the following day, July 29, the employees, through union agent Tom Fair, as the General Counsel alleges, made an unconditional offer on behalf of the employees to return to work when Fair repeatedly asked both Kilar and Smith, regardless of whether Respondent would recognize the Union as the employees' collective-bargaining agent, whether Respondent was prepared to permit "these gentlemen to return to work." The only response was that Respondent would not permit them to return; that Respondent's position was that the employees had "quit"; and that was Respondent's "position." Thus, notwithstanding that Respondent had not terminated the employees on their way to punching out on the previous day, it certainly left no room for doubt that they were terminated when, on the next day (July 29), it refused to permit them to return to work from an economic strike. *Redlands Christian Migrant Association*, 250 NLRB 134,

142–143 (1980). Respondent's July 29 refusal to do so manifested a termination of the undifferentiated group for having engaged in a protected concerted work stoppage and economic strike on July 28. Smith knew of the employees' grievances and strike as early as Kuntz' telephone call to him in the morning of July 28. To terminate them for such a reason violates Section 8(a)(1) of the Act. *Tamara Foods, Inc., supra*, and cases therein.

With regard to Respondent's defense that the employees "quit," the proof of such a defense rested primarily on the anticipated testimony of Tom Kilar, Sr., Tom Kilar, Jr., and Mildred Kilar. They were not produced.

Smith's testimony is mostly hearsay flowing from conversations with Tom Kilar, Sr., regarding the employees punching out and retrieving their tools. Of itself, testimony that employees punched out and took their tools does not establish a "quit" defense since they retrieved their tools only after Kilar's refusal to permit them to return; i.e., after they were discharged. To the extent Smith testified that he heard Nolf, by telephone, say that the employees "quit," I do not credit it. Here, as Perrotta credibly testified, Perrotta told the employees that he was going to stop work until he could get President Smith to come down and talk to the employees about the problems they had. This does not manifest a desire to permanently sever employment, *Gasko & Meyer, Inc.*, 258 NLRB 349 (1981); nor is there even a threat to quit, *Empire Gas, Inc. of Denver*, 254 NLRB 626 (1981); nor did the employees remove their tools in the face of the employer imploring them to remain in employment, *Pink Supply Corporation*, 249 NLRB 674 (1980); nor is there here any ambiguity created by the employees' walkout, *Pennypower Shopping News, Inc.*, 253 NLRB 85 (1980). Rather, Respondent clearly was retaliatory against the entire group, including Supervisor Perrotta, for engaging in protected concerted activity. Interestingly, Respondent's payroll records noted that the employees ceased employment when they "walk out." No "quit" is recorded. The object of such a mass walkout is hardly the permanent severance of employment or evidence of a mass "quit."[12]

Under the Board rule, employees who are unlawfully discharged, as the instant employees, for having engaged in a lawful strike are entitled to reinstatement and backpay from the date of the discharge (July 29, 1981) until the date that they are offered reinstatement, *Tamara Foods, Inc., supra*, 258 NLRB 1307, citing *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), enforcement denied on other grounds 612 F.2d 6 (1st Cir. 1979). They are entitled to backpay and reinstatement even though they do not offer unconditionally to return or to request reinstatement since it is the employer who has acted unlawfully in discharging them and the burden is on the employer to undo his unfair labor practices by offering immediate reinstatement and reimbursement for all losses attributable to or flowing from the employer's unlawful action until he offers full and lawful reinstatement. *Abilities and Goodwill, Inc., supra*. Here, of course, the employees, through Fair, offered unconditionally to return to work on July 29 and they have been consistently refused reinstatement, though there is work available for them, on Respondent's theory that they all "quit." No other defense was advanced.

[12] The General Counsel accurately cites *Nyari Odette, Inc.*, 229 NLRB 137, 145 (1977), and *Grismac Corporation*, 205 NLRB 1108 (1973), to support this conclusion against a conclusion of a "quit." The evidence, based on the remarks of Kilar Sr., also shows rather heated union animus. Since the case was not presented on the theory of discrimination, I do not reach the question whether Respondent refused reinstatement because it feared the employees' association with the Union.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that it order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that on July 29, 1981, Respondent unlawfully discharged the six alleged discriminatees (five employees and Supervisor Perrotta) and has thereafter refused and failed to offer them full and immediate reinstatement, I shall recommend that Respondent cease and desist from such unlawful conduct and offer them full and immediate reinstatement to their old jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I shall also recommend that Respondent make them whole for any loss of pay they may have suffered, because of Respondent's unlawful conduct, by payment to them of a sum equal to that which they would have earned from the date of their discharges until they are reinstated or receive valid offers of reinstatement, less any net interim earnings. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

I have no hesitation, under Board rule, in including Supervisor Joseph Perrotta among the total of six persons, five of whom are clearly employees, in this recommended remedy notwithstanding that I have found him to be a statutory supervisor, albeit of the lowest level. Respondent's conduct demonstrates that its discharge of the entire group, at one stroke, was a single retaliatory act aimed at the employees engaging in protected concerted activity, the inclusion of Perrotta merely being part of Respondent's coercive conduct against employees, aimed at the discouraging of their Section 7 rights. *Empire Gas, Inc. of Denver*, 254 NLRB 626; *Pennypower Shopping News, Inc., supra*, 253 NLRB at 86, fn. 1.[14] Thus, Respondent has the right to discipline a supervisor, including Perrotta, for disloyalty in engaging in union activity. Any discipline, including discharge, reasonably adapted to promoting an objective of insuring supervisor discipline is privileged and goes beyond the proscription of Section 8(a)(1) of the Act. See for instance: *Stop and Go Foods, Inc.*, 246 NLRB 1076 (1979); *L & S Enterprises, Inc.*, 245 NLRB 1123 (1979). Where supervisors are singled out for discipline because of their

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[14] See, generally, *Sheraton Puerto Rico Corp.*, 248 NLRB 867, and *Downslope Industries, Inc.*, 246 NLRB 948 (1979).

disloyalty, the mere fact that employees may fear that a similar fate might befall them if they engage in protected concerted activity does not suffice to transform the employees' conduct into an unlawful restraint upon these employees. *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980), citing *Nevis Industries, Inc.*, 246 NLRB 1053 (1979). However, where, as here, the record demonstrates that the employer's inclusion of the supervisor in the general discharge of the employees was motivated by and incidental to a desire to unlawfully discourage statutorily protected activities among the *employees*, the employer's actions will be found to have exceeded the limits of legitimate conduct intended to discourage participation in concerted activity by supervisors. *Empire Gas, Inc. of Denver*, 254 NLRB 626 (Member Penello, concurring).

CONCLUSIONS OF LAW

1. Respondent, Serendippity-Un-Ltd. and Tigerrr, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act on July 29, 1981, by discharging employees Leroy Nolf, Dan Kuntz, Gordon Parrish, Frank McCann, and Steven Biskup and Supervisor Joseph Perrotta, because the above employees engaged in a strike over working conditions in Respondent's Hubbard, Ohio, plant.

3. The above unfair labor practice affects commerce within the meaning of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue, pursuant to Section 10(c) of the Act, as amended, the following recommended:

ORDER[15]

The Respondent, Serendippity-Un-Ltd. and Tigerrr, Inc., Hubbard, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Leroy Nolf, Joseph Perrotta, Dan Kuntz, Gordon Parrish, Frank McCann, and Steven Biskup immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, dismissing if necessary any replacements and make them whole for their loss of earnings, with backpay to commence on July 29, 1981, with interest thereon to be computed as described in that section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Hubbard, Ohio, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."